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No. 10-980

In the
Supreme Court of the United States

EVAN GRIFFITH,

PETITIONER,

v.

DAVE REDNOUR, WARDEN,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) imposes a one-year limitations period on the filing of federal habeas petitions by state prisoners. 28 U.S.C. § 2244(d)(1). That period is tolled while "a properly filed application for State post-conviction * * * review * * * is pending." *Id.* § 2244(d)(2). "The time that an application for state postconviction review is 'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law." *Evans v. Chavis*, 546 U.S. 189, 191 (2006) (emphasis in original).

The questions presented are:

1. Whether certiorari review is warranted to decide if a state court's decision to accept a late petition for leave to appeal (PLA) retroactively renders that PLA "pending" during the period between its due date and the filing of the request to file it *instanter* where (a) every circuit that has decided the issue has held, as the Seventh Circuit did below, that it does not, and (b) the premise of petitioner's argument—that the order allowing him to file his PLA *instanter* made the PLA timely under state law—rests on a disputed point of state law that the Seventh Circuit resolved against him.

2. Whether this case is a proper vehicle for deciding whether there is an "actual innocence" exception to AEDPA's limitations period where the state courts, whose factual findings are "presumed to be correct" in federal habeas proceedings unless rebutted "by clear and convincing evidence," 28 U.S.C. § 2254(e)(1), rejected petitioner's actual innocence claim based on live testimony at a postconviction evidentiary hearing.

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BRIEF IN OPPOSITION

The certiorari petition should be denied. Every circuit to decide the issue has correctly held, as the Seventh Circuit did below, that after a postconviction petition ceases to be "pending" under § 2244(d)(2)—because the time for appealing a lower court's adverse determination has expired without the petitioner taking any action to continue the litigation—a state court's decision to accept an out-of-time appeal does not retroactively toll the time that already ran untolled between the day that the petition for leave to appeal was due and the day that the belated request to file it was made. The contrary rule would "undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Carey v. Saffold*, 536 U.S. 214, 226 (2002).

In any event, the very premise of petitioner's argument—that the Illinois Supreme Court's decision allowing him to file his PLA *instanter* made his PLA timely under state law—rests on a disputed question of state law that the Seventh Circuit (correctly) resolved against him. Therefore, even if this Court granted certiorari and held, contrary to the unanimous consensus of the circuits to decide the issue, that a state court's decision to retroactively extend a petitioner's time for appealing also retroactively tolls AEDPA's one-year limitations period, the Seventh Circuit's judgment in this case would be unaffected.

Nor is this case a proper vehicle to reach petitioner's second question. Even if this Court held that a petitioner who demonstrates actual innocence may file a federal habeas petition outside AEDPA's limitations

period, this holding would have no effect on the outcome in this case. Petitioner presented a stand-alone innocence claim in his state postconviction petition. Following an evidentiary hearing on the claim, the postconviction trial court found that petitioner's witnesses lacked credibility and that the evidence did not establish actual innocence. These factual findings are "presumed to be correct" in federal habeas proceedings, and petitioner offers no "clear and convincing evidence" to rebut that presumption. 28 U.S.C. § 2254(e)(1).

Finally, both issues in the petition may become moot before this Court could render a decision on the merits. Petitioner has a pending successive postconviction petition seeking re-sentencing on the murder conviction at issue in this appeal. If petitioner is re-sentenced, the new judgment entered in that proceeding would re-start AEDPA's limitations period, allowing petitioner to file a new, timely habeas petition in this case.

STATEMENT

A. Trial and Direct Appeal

In 1990, while incarcerated at Illinois' Pontiac Correctional Center, petitioner killed fellow inmate Joseph Moore by stabbing him with a "shank." Pet. App. 99a-100a. Petitioner was tried before a jury in the Circuit Court of Livingston County, Illinois. The evidence, as recounted by the state appellate courts on direct and postconviction appeal, is described below. See 28 U.S.C. § 2254(e)(1) (state court factual determinations "presumed to be correct" on federal

habeas review unless petitioner "rebut[s] the presumption of correctness by clear and convincing evidence").

Petitioner, Moore, and Wilford Mackey, another inmate, were members of the Black Gangster Disciples street gang. Pet. App. 99a-100a. Moore led the gang within the prison. *Ibid.* Petitioner served as Moore's personal secretary and bodyguard. Pet. App. 100a. On October 2, 1990, petitioner, Moore, and Mackey were in the prison's south yard. *Ibid.* Moore was using one of the yard's telephones at approximately 11:00 a.m. when Mackey approached him from behind and repeatedly struck him on the head with a metal rod or pipe. *Ibid.* Petitioner then stabbed Moore in the chest with a shank. *Ibid.*

Correctional Officer Eddie Grant testified that, on the morning of the attack, at approximately 10:45 a.m., he went to the prison's south yard to line up the inmates for lunch. Pet. App. 49a. Grant saw petitioner, Moore, Mackey, and another inmate sitting on a table in the yard. *Ibid.* As Grant entered the yard, he saw Moore walk toward the bank of telephones. *Ibid.* Grant approached the table, and Mackey told him that they would eat later. *Ibid.* Grant then returned to the cellhouse. *Ibid.*

Inmates Michael Marzette, Bernie Cleveland, and Larry Nelson were in the yard during the attack and testified for the State. Pet. App. 52a. Marzette testified that he was using one of the telephones when he saw a black man strike Moore, who was also on the telephone, on the side of the head. *Ibid.* Moore dropped the phone and began to defend himself, at which time petitioner stabbed him. *Ibid.* Cleveland likewise testified that he

was using one of the phones when he saw a black man strike Moore on the head with a metal pipe. *Ibid.* He then saw petitioner stab Moore in the chest. *Ibid.* Nelson, who was using the telephone next to Moore when the attack occurred, testified that he heard a "popping noise," turned around, and saw Mackey trying to hit Moore with a pipe. Pet. App. 53a. He then saw petitioner stab Moore in the chest. *Ibid.*

Marzette and Cleveland acknowledged that they initially told prison investigators that they did not see the attack. Pet. App. 52a. Cleveland, moreover, acknowledged that he was transferred to a lower security prison, but he denied having any previously lost good-conduct credits restored or receiving any other benefit for his cooperation. Pet. App. 53a. Prison Investigator Russell Nelson testified that, for safety reasons, he transferred Marzette, Cleveland, and inmate Nelson from Pontiac, a maximum-security prison, to medium-security facilities. Pet. App. 51a. While Investigator Nelson did not know if any of the inmate witnesses had lost good-conduct credits restored—and testified that he had "nothing to do with restoring any grade or lost good time or anything like that for these three inmates"—he acknowledged that he may have told his superiors to restore good-conduct credit to the inmate witnesses. *Ibid.* In particular, Investigator Nelson testified that inmate Nelson was released from prison not long after the investigation and acknowledged that it was possible that he got "out earlier than he would have if he would not have testified." *Ibid.*

Prison Investigator Ed Kallal, the crime-scene technician, described the layout of the prison's south

yard. Pet. App. 47a-48a. The fenced-in yard includes a baseball field in one corner, an asphalt running track around its perimeter, an outdoor bathroom (with 40-inch high walls surrounding it), and 8 telephones in partial booths along the south wall. *Ibid.* When Kallal arrived on the scene, he observed a pool of blood near the baseball field's first-base line and a round, metal rod near the blood. Pet. App. 48a. Earlier, Correctional Officer Kevin Smith had found the rod in a trash bag tied to a fence and laid it next to Moore's body. Pet. App. 49a. Kallal also observed blood below the northeastern phone booth and a trail of blood toward the bathrooms and "out into the grass for about 40 feet." Pet. App. 48a. Kallal found blood droplets on the outside of the bathroom wall and on the inside surfaces of the wall. *Ibid.* He opined that the blood may have been left on the wall by someone running past it with a bleeding head wound. *Ibid.* Kallal noted that Moore suffered a forehead wound that was approximately 3/4 inches wide and 1-3/4 inches long. *Ibid.* Kallal also found an "ice-pick-type" shank inside the phone booth and Moore's broken eyeglasses on the ground nearby. *Ibid.* He found a flat-bladed shank between the phone booths and the bathroom, along the trail of blood. *Ibid.* Petitioner's palm print was found on the handle of the flat-bladed shank. *Ibid.*

Dr. Hans Stroink, the pathologist who performed Moore's autopsy, testified that Moore died from an incisional wound to his upper chest. Pet. App. 51a. Dr. Stroink further testified that Moore suffered a blunt trauma injury to his head caused by considerable force and consistent with a blow from the metal rod that Officer Smith found in the trash bag. Pet. App. 50a. Superintendent William Boyd similarly testified that,

when he first observed Moore lying face down in the yard, he could not identify him because "his face was badly bruised." Pet. App. 49a. Dr. Stroink noted a nick at the bridge of Moore's nose that may have been caused by his broken eyeglasses. Pet. App. 50a. Dr. Stroink concluded that Moore's facial injuries were unlikely to have been caused by falling into the bathroom wall, although he could not exclude such a collision as a possible cause of Moore's facial injuries. Pet. App. 50a-51a.

Petitioner and two other inmates testified for the defense. Petitioner admitted that he stabbed Moore but claimed that he did so in self-defense. Pet. App. 53a. Petitioner testified that he and Moore did not see "eye to eye" because Moore often assigned petitioner menial tasks to test his loyalty. Pet. App. 53a-54a. Petitioner testified that the night before the incident, he received a message that Moore wanted to see him. Pet. App. 54a. Petitioner sent a message back to Moore that he could not meet that night. *Ibid.* When petitioner encountered Moore the next morning, as the two waited to enter the south yard, Moore was upset that petitioner failed to meet him the prior evening and became verbally abusive. *Ibid.* According to petitioner, when the two entered the yard, Moore told petitioner to leave him alone, and the two went in different directions. *Ibid.* Petitioner later made his way to the telephone area and sat at a table with inmate John Gibson. *Ibid.* At this time, Moore was using one of the telephones. *Ibid.* Gibson suggested that petitioner try to clear things up with Moore. *Ibid.* Petitioner testified that he then approached Moore and tapped him on the shoulder. *Ibid.* According to petitioner, Moore told petitioner to "get the fuck away" and pulled out a shank. Pet. App.

54a-55a. Petitioner brandished his own shank and motioned for Moore to back away. Pet. App. 55a. Instead of backing away, Moore stepped toward petitioner. *Ibid.* Petitioner testified that he then jabbed his shank toward Moore to repel him, and that when Moore ducked down and came back up, petitioner stabbed him in the chest. *Ibid.* Moore ran toward the baseball field, lost his footing, and fell against the wall enclosing the toilets. *Ibid.* Gibson and inmate Kevin Walton testified to a similar version of events. Pet. App. 55a-57a.

The jury found petitioner guilty of first-degree murder and unlawful possession of a weapon by a person in the custody of the Illinois Department of Corrections (DOC). Pet. App. 99a. Petitioner waived his right to a jury at the sentencing hearing, and the court sentenced him to death on the murder conviction and 30 years' imprisonment on the weapon conviction. Pet. App. 99a-102a.[1]

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[1] In January 2003, the Illinois Governor commuted petitioner's capital sentence to a sentence of life imprisonment without the possibility of parole. Pet. App. 47a. In 2008, petitioner was granted federal habeas relief on a separate murder conviction, and re-trial proceedings in that case are currently pending in the Circuit Court of Cook County, Illinois. In March 2009, petitioner filed a successive postconviction petition in the Circuit Court of Livingston County, seeking re-sentencing on the murder conviction at issue in this appeal, in light of the vacatur of the Cook County conviction, which served to enhance the sentence on the Livingston County conviction. The successive postconviction petition remains pending.

On direct appeal, the Illinois Supreme Court affirmed. As relevant to petitioner's current habeas claims, the court rejected petitioner's claims that his counsel was ineffective and that his decision to forgo a jury instruction on second-degree murder was not knowing and voluntary. Pet. App. 99a-140a. On October 17, 1994, this Court denied his certiorari petition. *Griffith v. Illinois*, 513 U.S. 952 (1994).

B. State Postconviction Proceedings

On March 31, 1995, petitioner filed a postconviction petition in the Circuit Court of Livingston County. Pet. App. 59a. Alleging that Marzette, Cleveland, and inmate Nelson had recanted their trial testimony, the petition, as amended, claimed that petitioner was actually innocent of the charge of first-degree murder. Pet. App. 60a-61a; see *People v. Washington*, 665 N.E.2d 1330, 1335-1337 (Ill. 1996) (recognizing free-standing claim of actual innocence based on newly discovered evidence under Illinois Constitution). The petition further alleged that the State had knowingly presented false testimony from those three inmate witnesses and, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), had failed to disclose Moore's and the inmate witnesses' complete criminal records or the fact that it had allegedly provided benefits to the inmate witnesses in exchange for their testimony. Pet. App. 60a-61a.

On February 21, 2002, the postconviction trial court heard live testimony from Marzette, Cleveland, and inmate Nelson at an evidentiary hearing. Pet. App. 62a. Each testified that his trial testimony was false. *Ibid.* As he did at trial, Nelson testified that he was on the telephone in the south yard at the time of the incident. *Ibid.* He now indicated, however, that after hearing a

loud "popping" sound, he turned around and saw petitioner and Moore "fighting." *Ibid.* After moving away from the scene, Nelson turned back and saw Moore run away from the phones, stumble into the wall around the toilets, and continue running before falling. *Ibid.* Nelson testified that he did not see who started the fight and that he did not see Mackey strike Moore with a pipe. *Ibid.* Nelson did testify, however, that as Moore ran away from the telephones, petitioner, with shank in hand, chased Moore and swung the shank at him. Pet. App. 62a-63a. Nelson testified that he implicated petitioner and Mackey as the aggressors because he was told that by doing so he would be able to transfer out of Pontiac and would have his previously lost good-conduct credits restored. Pet. App. 63a.

Marzette testified that, at the time of the incident, he was using one of the telephones in the south yard. Pet. App. 64a. After hearing people behind him "scuffling around," he turned and saw a man run and then fall. *Ibid.* Contrary to his trial testimony, Marzette stated that he did not see petitioner "out there that day" and did not pay attention to the incident because it did not concern him. *Ibid.* Marzette claimed that he testified falsely at trial because prison investigators threatened to charge him with Moore's murder and prosecute him for not telling what he knew, and because the investigators told him that the leader of the Vice Lords gang "had a hit" on him. Pet. App. 65a.

Cleveland testified that, although he was using a telephone in the south yard at the time of the incident, he saw only the "aftermath." Pet. App. 66a. According to Cleveland, when Investigator Nelson asked whether he had seen the incident, and whether he could identify

petitioner and Mackey as the murderers, Cleveland responded that it depended on what he could receive in return for his information. *Ibid.* Cleveland testified that, the next day, Investigator Nelson told him that he could have two pending charges "taken care of" if Cleveland told him who killed Moore. *Ibid.* Cleveland then told Nelson that he had seen the stabbing, following the version "painted" by the investigators. *Ibid.* According to Cleveland, in exchange for his cooperation, he was transferred to a lower security prison, had a pending postconviction petition in Logan County, Illinois, granted and his sentence reduced, had six months of good-conduct credits restored, and had a pending charge of assaulting a correctional officer "disappear." Pet. App. 67a. Because of his cooperation, Cleveland testified, he served only one year of a seven-year sentence and had a six-year sentence reduced by a year. *Ibid.* After the evidentiary hearing, petitioner submitted an affidavit from Cleveland's Logan County postconviction counsel to corroborate aspects of Cleveland's testimony. PCC1020-1021.

Prior to the evidentiary hearing, the postconviction trial court denied petitioner's motion to review the inmate witnesses' DOC files, finding that the request "amount[ed] to an unwarranted discovery expedition and that good cause [was not] shown." PCC835. After the hearing, however, the court granted petitioner's renewed motion to review Cleveland's DOC file. PCC1155; Pet. App. 67a-68a.

On its own motion, the court reopened the evidentiary hearing and heard testimony from Mackey.

Pet. App. 68a.[2] Mackey testified that he was not in the south yard at the time of the incident and knew nothing about the killing. *Ibid.*

The postconviction trial court denied relief. Pet. App. 69a. Recognizing that "the question [is] how important was the testimony of [inmates Nelson], Marzette[,] and Cleveland, and how much weight to give their recantations," the court concluded that "the proof [was] simply not there to show that there was perjury the first time around on these three witnesses." Pet. App. 69a-70a. The court found that inmate Nelson's testimony at the postconviction evidentiary hearing—that petitioner chased Moore with a shank after "any danger had arguably passed"—"hurt * * * [petitioner] more than it help[ed] him." Pet. App. 69a. With respect to Marzette's postconviction testimony, the court found that it provided no details to support petitioner's self-defense claim. *Ibid.* And the court discredited Cleveland's recantation testimony because Cleveland was "all over the place on his view of the facts" and is "capable of saying whatever moves him and [is] not particularly concerned with the truth." Pet. App. 70a. Finally, the court found that the witnesses' recantation testimony was at odds with the forensic evidence presented at trial, which, consistent with the witnesses' original trial testimony, established that

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[2] Mackey pleaded guilty to one count of armed violence, without conceding the correctness of the State's evidence, and was sentenced to 15 years' imprisonment. Pet. App. 67a; see *Mackey v. Loftus*, No. 07-3263, 2008 WL 3849912 (C.D. Ill. Aug. 15, 2008).

Moore was hit in the head with a pipe before petitioner stabbed him in the chest. *Ibid.*

The Illinois Appellate Court affirmed. Pet. App. 46a-98a. Because the postconviction trial court denied relief following an evidentiary hearing, the standard of review under Illinois law was for "manifest error." Pet. App. 74a. Applying this standard to petitioner's actual innocence claim, the appellate court held that "the trial court correctly concluded that the inmates' recant[ation] testimonies were less credible than their trial testimonies." Pet. App. 82a; see also *ibid.* (finding no "basis in the record * * * [to] second-guess the trial court's judgment").

The appellate court also affirmed the postconviction trial court's denial of petitioner's request to examine Nelson's and Marzette's DOC files, finding that the trial court did not abuse its discretion. Pet. App. 76a-78a. Because Nelson and Marzette, unlike Cleveland, did not testify specifically "to what, if any, good-time credit they had actually received," the appellate court held that those files "would not have demonstrated how their alleged false testimony had earned them unwarranted restoration of good-time credits." Pet. App. 77a. The court also noted that, even without the files, petitioner was "able to make detailed allegations of how the State coerced and promised the inmates to testify falsely," and that he "fail[ed] to specify what additional relevant materials were contained in the DOC files * * * and how these additional materials would constitute additional evidence to his claim." Pet. App. 78a.

The Illinois Appellate Court issued its decision affirming the denial of petitioner's postconviction petition on July 13, 2005. Pet. App. 46a. Under Illinois

law, petitioner had 35 days—until August 17, 2005—to file a PLA in the Illinois Supreme Court. See Ill. Sup. Ct. R. 315(b) (2005). Petitioner did not file a PLA (or a motion to extend the time to file one) within that period. Pet. App. 14a. Rather, on September 1, 2005, petitioner filed a motion for leave to file a PLA *instanter*, along with his out-of-time PLA, explaining that due to illness, counsel had been unable to file the PLA, or seek an extension of time, "before the due date." Pet. App. 146a-148a. On September 13, 2005, the Illinois Supreme Court granted petitioner's motion for leave to file the PLA *instanter*. Pet. App. 152a. On December 1, 2005, the court denied the PLA. Pet. App. 45a.

C. Federal Habeas Proceedings

On November 30, 2006, 364 days after the Illinois Supreme Court denied his PLA, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Central District of Illinois. Pet. App. 14a-15a. The district court dismissed the petition as untimely under AEDPA's one-year limitations period. Pet. App. 27a-44a.

Because petitioner's conviction became final before AEDPA took effect, the district court held that the federal limitations period did not begin to run until AEDPA's effective date of April 24, 1996. Pet. App. 35a; see *Saffold*, 536 U.S. at 217. Moreover, because petitioner's postconviction petition was filed in March 1995 and was still pending in the state trial court on April 24, 1996, the limitations period was tolled immediately. Pet. App. 35a. The state trial court denied petitioner's postconviction petition in August 2003, and the state appellate court affirmed that

judgment on July 13, 2005. Pet. App. 46a. The district court held that petitioner's postconviction proceedings remained pending—and the limitations period therefore remained tolled—until August 17, 2005, when petitioner's time for seeking further review in the Illinois Supreme Court expired. Pet. App. 35a-40a. Because no postconviction proceedings were pending in state court between August 17, 2005 (when the time for filing a PLA expired) and September 1, 2005 (when petitioner filed a motion for leave to file a PLA *instanter*), however, the limitations period was not tolled during those days. Pet. App. 43a. Adding those 14 untolled days to the 364 untolled days that elapsed between the date the Illinois Supreme Court denied petitioner's PLA and the date petitioner filed his federal habeas petition, the district court found the petition untimely under § 2244(d)(1)(A). *Ibid.* Finding no grounds to apply equitable tolling, the district court dismissed the petition with prejudice. Pet. App. 40a-43a.

The Seventh Circuit granted a certificate of appealability and affirmed. Pet. App. 13a-19a. The court first rejected petitioner's contention that, because the Illinois Supreme Court granted his motion for leave to file a PLA *instanter*, his PLA was timely—and therefore pending retroactively to August 17—as a matter of state law. Pet. App. 16a. The court noted that "[a] decision to accept a document *instanter* (law Latin for 'right now' or 'immediately') does not make it timely; it just means that the document will be considered on the merits." *Ibid.*; see also Pet. App. 17a (finding no distinction, for purposes of Illinois law, between court "accept[ing] * * * filing despite its belated submission," "grant[ing] a retroactive extension of

time," and "accept[ing] * * * filing *instanter*") (citing *Wauconda Fire Prot. Dist. v. Stonewall Orchards, LLP*, 828 N.E.2d 216, 220-223 (Ill. 2005)). The court further held that, for purposes of the federal limitations period, "[o]nce a petition has stopped being 'pending'"—*i.e.*, once the time for appealing the denial of postconviction relief to a higher court has expired without any action to continue the litigation—a state court's decision to retroactively extend the time for seeking further review does not retroactively "make [the petition] pending during the time after the federal clock began to run and before another paper is filed in state court." Pet. App. 17a. Accordingly, because petitioner did not have postconviction proceedings pending in state court on the 14 days that elapsed between the date on which his PLA was due and the date on which he sought leave to file *instanter*, those 14 days were not tolled under § 2244(d)(2). Pet. App. 17a.

Finally, adhering to its prior decision in *Escamilla v. Jungwirth*, 426 F.3d 868, 871 (7th Cir. 2005), the court rejected petitioner's contention that AEDPA's limitations period "do[es] not apply to a person who claims to be actually innocent." Pet. App. 18a.

REASONS FOR DENYING THE PETITION

I. Certiorari Review Is Not Warranted On The § 2244(d)(2) Question.

Section 2244(d)(2) tolls AEDPA's one-year limitations period while "a properly filed application for State post-conviction * * * review * * * is pending." 28 U.S.C. § 2244(d)(2). Because a postconviction petition remains "pending as long as the ordinary state collateral review process is 'in continuance,'" *Saffold*, 536 U.S. at

219-220, the time that a petition is "'pending' includes the period between (1) a lower court's adverse determination, and (2) the prisoner's filing of a notice of appeal, *provided that* the filing of the notice of appeal is timely under state law." *Evans v. Chavis*, 546 U.S. 189, 191 (2006) (emphasis in original).

The issue petitioner asks this Court to resolve is whether a habeas petitioner who does not timely file a notice of appeal from a lower court's adverse determination, but is later allowed to file an appeal *instanter*, is entitled to retroactive tolling for the period that elapsed between the due date for a timely appeal and the request to file *instanter*. Petitioner challenges language in the Seventh Circuit's decision that the limitations period is not retroactively tolled during that period, even if the state court decides to treat the untimely appeal as timely for state law purposes, because "[o]nce a petition has stopped being 'pending,' nothing a state court does will make it pending during the time after the federal clock began to run and before another paper is filed in state court." Pet. App. 17a.

Certiorari should be denied for three, independent reasons. *First*, there is no conflict among the circuits on this issue. In fact, every other circuit that has decided the issue has reached the same conclusion as the Seventh Circuit. *Second*, the Seventh Circuit's decision is consistent with this Court's decisions recognizing § 2244(d)(2)'s purpose of "encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226. The rule urged by petitioner would undermine this purpose by permitting indefinite retroactive tolling of the limitations period whenever a state court, for

whatever reason, decided to accept an otherwise untimely filing and resolve it on the merits. See *id.* at 225-226 (explaining varied reasons why "[a] court will sometimes address the merits of a claim that it believes was presented in an untimely way"). The Seventh Circuit's rule, in contrast, encourages prompt exhaustion of state remedies and protects petitioners from the running of the limitations period while these remedies are pursued, by tolling the limitations period *prospectively* from the date on which a request for an out-of-time appeal is made. *Third*, because the Seventh Circuit rejected petitioner's reading of state law and held that the Illinois Supreme Court's decision to allow petitioner to file his PLA *instanter* did not make the PLA timely, a decision for petitioner on the first question presented would not make his habeas petition timely. Accordingly, even if this Court were to hold that a state court's decision to retroactively extend a petitioner's time for appealing also retroactively tolls the limitations period, the Seventh Circuit's judgment affirming the dismissal of petitioner's habeas petition would be unaffected.

A. There Is No Conflict Among The Circuits On The Question Presented.

The Seventh Circuit indicated that, even if Illinois law counted an *instanter* submission as timely filed (and the court found that it did not), a state court's decision to accept an untimely filing *instanter* would not retroactively toll AEDPA's limitations period for the time that already ran untolled between the day that the filing was due and the day that the request to file *instanter* was made. Pet. App. 17a ("Once a petition has stopped being 'pending,' nothing a state court does will

make it 'pending' during the time after the federal clock began to run and before another paper is filed in state court.").

The Fourth, Fifth, Eighth, Tenth, and Eleventh Circuits—every other circuit to have decided the question—have reached the same conclusion. See *Allen v. Mitchell*, 276 F.3d 183, 185 (4th Cir. 2001) ("statute of limitations is not tolled between the expiration of a state appeal deadline and the subsequent filing of an untimely appellate petition")[3]; *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001) (when "state limitations period expire[s]," petitioner "is not entitled to further appellate review and, therefore, he has no application 'pending' in state court"; "state court's subsequent decision to allow review may toll the time relating directly to the application, but it does not change the fact that the application was not pending prior to the application"); *Streu v. Dormire*, 557 F.3d 960, 966 (8th Cir. 2009) ("an application is not 'pending' between the expiration of the time for appeal and the filing of a petition for belated appeal"); *Gibson v. Klinger*, 232 F.3d 799, 804, 807 (10th Cir. 2000) ("state court's grant of leave to appeal out of time cannot erase the time period during which nothing was pending before a state

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[3] Because North Carolina law, unlike Illinois law, lacked "fixed appellate deadlines," the Fourth Circuit remanded for further proceedings to determine whether the petitioner's appeal had been timely filed. *Allen*, 276 F.3d at 186 (petition for certiorari to state appellate court must be filed "without unreasonable delay"); cf. *Saffold*, 536 U.S. at 222 (North Carolina and California are only States that do not "specify precise time limits * * * within which an appeal must be taken").

court"; "after [petitioner's] thirty days to appeal expired, the limitations period was not tolled until he filed his * * * application for leave to appeal [out of time]"); *Moore v. Crosby*, 321 F.3d 1377, 1380 (11th Cir. 2003) (adopting *Melancon*'s reasoning that "state court's subsequent decision to permit review [after period for appeal had expired] may toll the time relating to the application [for a late appeal], but it does not change the fact that the application was not pending prior to the filing of the application"); see also *Drew v. MacEachern*, 620 F.3d 16, 22 n.3 (1st Cir. 2010) (reserving issue but noting that other circuits' decisions "create doubt whether such a reopening and reinstatement for state law purposes would make the petition one that had been 'pending' for federal habeas purposes throughout the lengthy period between its dismissal and its resurrection").

Petitioner nevertheless contends that the Seventh Circuit's decision "conflicts with the approach taken by other circuits which defer to state court determinations of their own rules" in determining when a postconviction petition is "pending" under § 2244(d)(2). Pet. 19. But none of the decisions petitioner cites holds that a state court, by accepting an otherwise untimely appeal and treating it as timely for state law purposes, may *retroactively* toll the federal limitations period for the time that already ran untolled between the expiration of the ordinary time for appeal and the request to file *instanter*. Rather, these decisions hold that a state's fixed procedural rules prospectively determine when a state petition is considered filed and ordinary state proceedings are considered final. For example, if a state employs the "mailbox rule" for deciding the date on which a petition is filed, or the

"mandate rule" for determining the date on which proceedings become final, then those dates determine when state postconviction proceedings start and cease to be "pending" under § 2244(d)(2). See *Causey v. Cain*, 450 F.3d 601, 606-607 (5th Cir. 2006) (mailbox rule)[4]; *Payne v. Kemna*, 441 F.3d 570, 571-572 (8th Cir. 2006) (mandate rule); *Adams v. LeMaster*, 223 F.3d 1177, 1181 (10th Cir. 2000) (mailbox rule); see also *Drew*, 620 F.3d at 21 (postconviction proceedings ceased to be pending on date "gatekeeper" justice denied petition for further appeal because such orders are "final and unreviewable" under state law).[5]

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[4] *Causey*, moreover, did not even address whether a postconviction petition was "pending" under § 2244(d)(2). Rather, "[t]he question presented * * * [was] when [the petitioner's] conviction became final" under § 2244(d)(1)(A). 450 F.3d at 603. Similarly, *Wade v. Battle*, 379 F.3d 1254, 1262 (11th Cir. 2004), *Merritt v. Blaine*, 326 F.3d 157, 162-163 (3d Cir. 2003), *Israfil v. Russell*, 276 F.3d 768, 771-772 (6th Cir. 2001), and *Adeline v. Stinson*, 206 F.3d 249, 252 (2d Cir. 2000), did not decide when a properly filed petition was *pending*, but rather whether a petition was properly filed at all. Here, the Seventh Circuit "d[id] not doubt that [petitioner's PLA] was 'properly filed'"; rather, the court held that the fact that it was properly filed on September 1 did "not imply that anything was 'pending'" before then. Pet. App. 18a.

[5] In *Jenkins v. Johnson*, 330 F.3d 1146 (9th Cir. 2003), on which petitioner also relies, the state court *denied* the petitioner's request to file an out-of-time appeal. See *id.* at 1148-1149. The Ninth Circuit nevertheless held that the postconviction proceedings remained pending until the state supreme court issued its decision refusing to allow the out-of-time appeal. See *id.* at 1153. But this Court's

But the Seventh Circuit likewise looks to state law on these and similar matters, as petitioner concedes. See, *e.g.*, *Simms v. Acevedo*, 595 F.3d 774, 777 (7th Cir. 2010) (mailbox rule); *Jones v. Hulick*, 449 F.3d 784, 789 (7th Cir. 2006) (mandate rule); see also Pet. 20-21. Thus, in this case, the Seventh Circuit looked to state law to determine that petitioner's postconviction proceedings remained pending for 35 days following the state appellate court's decision, even though petitioner did not file a PLA within that time. Pet. App. 14a (citing Ill. Sup. Ct. R. 315(b)). If Illinois law provided, say, a 45- or 60-day period for filing a PLA, petitioner's postconviction proceedings would have remained pending throughout those periods. In each of these instances, a State's fixed rules of procedure are given prospective effect in determining the pendency of state proceedings within the meaning of § 2244(d)(2).

It is only on the narrow question of whether a state court's decision to accept an otherwise untimely appeal may render a petition *retroactively* pending, where previously the petition had not been pending during that same period, that the decision below—in line with every other circuit to decide the issue—indicates that the federal limitations period may not be so manipulated.

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subsequent decision in *Chavis* overruled that holding. See 546 U.S. at 197 ("only a *timely* appeal tolls AEDPA's 1-year limitations period for the time between the lower court's adverse decision and the filing of a notice of appeal in the higher court") (emphasis in original).

B. The Seventh Circuit's Decision Is Consistent With This Court's Decisions Interpreting § 2244(d)(2).

The Seventh Circuit's decision is also consistent with this Court's decisions interpreting § 2244(d)(2) in light of AEDPA's purpose of "encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." *Saffold*, 536 U.S. at 226. The Seventh Circuit held that the meaning of the word "pending" in § 2244(d)(2) "is a question of federal law" that could not be interpreted in a manner that would "'sap the federal statute of limitations of much of its effect.'" Pet. App. 16a-17a (quoting *Fernandez v. Sternes*, 227 F.3d 977, 980 (7th Cir. 2000)). Allowing retroactive tolling of the limitations period would do just that. See *Allen*, 276 F.3d at 186 (retroactive tolling "would undermine the statute of limitations by allowing state courts to extend indefinitely the time for seeking federal review").

This is consistent with *Chavis* and *Saffold*, which recognized that § 2244(d)(2) is a federal statute that may not be interpreted in a manner that undermines the independent federal interests that AEDPA's limitations period protects. *Chavis* and *Saffold* applied § 2244(d)(2) to California's system of postconviction review (which does not provide fixed deadlines for prisoners to appeal, but requires only that they do so within a "reasonable time" from the lower court's decision). *Chavis*, 546 U.S. at 192-193; *Saffold*, 536 U.S. at 222. In such a system, the question whether an appeal is timely—so that AEDPA's limitations period is tolled during the period between the lower court's determination and the filing of an appeal—"may [be]

more difficult" than it is in the typical system, such as Illinois', with fixed deadlines for appeal. *Saffold*, 536 U.S. at 223. This Court held, nevertheless, that federal courts applying § 2244(d)(2)'s tolling rule to California's postconviction system must undertake the task of determining whether an appeal was taken within a "reasonable time," and was therefore timely filed, under state law. *Saffold*, 536 U.S. at 225-226; *Chavis*, 546 U.S. at 193.

But neither decision held that, by accepting an otherwise untimely appeal and treating it, for state law purposes, as though it had been timely filed, a state court may *retroactively* toll AEDPA's limitations period. Cf. *Saffold*, 536 U.S. at 219-220 (postconviction petition remains "pending as long as the *ordinary* state collateral review process is 'in continuance'") (emphasis added). In fact, the Court held that, even if the California Supreme Court decided a postconviction appeal on the merits despite finding it untimely—the situation, in a "reasonable time" system like California's, most closely analogous to a court's decision in a fixed-deadline system to accept an otherwise untimely appeal and decide it on the merits—the petition "would no longer have been 'pending' during this period." *Saffold*, 536 U.S. at 225. *Chavis*, moreover, stressed that the decision in *Saffold*, applying § 2244(d)(2) tolling to the period in California between a lower court's decision and a timely appeal (as determined by California's "reasonable time" standard rather than under a fixed deadline), proceeded from "the assumption that California law * * * did not differ significantly from the laws of other States * * * [and] would not lead to filing delays substantially longer than those in States with determinate timeliness rules."

Chavis, 546 U.S. at 199-200 (emphasis omitted); see also *id.* at 201 (even if California were to treat an "unexplained 6-month filing delay [as] 'reasonable,'" this Court could not "see how [a] delay of [that] magnitude could fall within the scope of the federal statutory word 'pending'").

Nor does the Seventh Circuit's decision conflict with *Walker v. Martin*, 131 S. Ct. 1120 (2011), which was a case about procedural default rather than AEDPA's statute of limitations. To be sure, *Martin* considered California's timeliness requirement for postconviction petitions. But the question presented was whether that requirement "qualif[ied] as an independent state ground adequate to bar habeas corpus relief in federal court." *Id.* at 1124. *Martin* did not address the meaning of the term "pending" in § 2244(d)(2), let alone decide that a state court's decision to accept an untimely filing *instanter* rendered the filing retroactively pending.

Meanwhile, the Seventh Circuit's decision here (like that of every other circuit to address the issue) reasonably balances the federal interest in the prompt filing of federal habeas petitions against AEDPA's requirement that petitioners exhaust their state remedies before proceeding in federal habeas. It does so by tolling the federal limitations period *prospectively* from the date on which a request for an out-of-time appeal is made until that out-of-time appeal is decided. As the Fourth Circuit recognized in *Allen*, "allowing tolling * * * while the untimely petition is actually under consideration by the state court" promotes exhaustion of state remedies without "undermin[ing] the statute of limitations by allowing state courts to extend indefinitely the time for seeking federal review."

276 F.3d at 186; see also *Melancon*, 259 F.3d at 407 (allowing prospective but not retroactive tolling when state court accepts out-of-time appeal "is consistent with Congress's intent to encourage exhaustion of state remedies without allowing petitioners to indefinitely toll the limitations period").

The Seventh Circuit's rule, accordingly, creates no "trap" for habeas petitioners. A petitioner who fails to timely appeal the denial of postconviction relief to a state appellate court still may exhaust his state remedies—and attempt to avoid a procedural default of his claims on federal habeas review—by seeking an out-of-time appeal. If the state court allows his late appeal, he not only avoids procedurally defaulting his claims but also extends the federal limitations period by tolling the time during which his late appeal is under consideration by the state court. Here, in fact, because the limitations period was tolled while petitioner's late PLA was under consideration by the Illinois Supreme Court, petitioner was left with more than 350 days in which to file his federal petition following the denial of his PLA.

A state court "will sometimes address the merits of a claim that it believes was presented in an untimely way," including "where the court wishes to show a prisoner (who may not have a lawyer) that it was not merely a procedural technicality that precluded him from obtaining relief." *Saffold*, 536 U.S. at 225-226. Discretionary state rules that allow courts to accept out-of-time appeals inure to petitioners' benefit, affording them the chance to avoid procedural defaults in federal court while prospectively tolling the limitations period. Petitioner's proposed rule, however,

would toll the limitations period in such situations not only during the (typically brief) period when a petitioner's out-of-time appeal is under review, but also for the (potentially quite lengthy) period before the petitioner even filed the out-of-time appeal. The prospect of nearly indefinite retroactive tolling of the federal limitations period for time during which the petitioner was not actively engaged in exhausting his state remedies would make state courts less likely to exercise their discretion to accept out-of-time appeals, if state legislatures did not remove such discretion entirely. Cf. *Martin*, 131 S. Ct. at 1130 ("if forced to choose between mandatory rules certain to be found 'adequate[ ]' [for procedural default purposes] or more supple prescriptions that federal courts may disregard as 'inadequate,' 'many States [might] opt for mandatory rules to avoid the high costs that come with plenary federal review,'" which "'would be particularly unfortunate for [habeas petitioners]'") (quoting *Beard v. Kindler*, 130 S. Ct. 612, 618 (2009)). The incentives created by petitioner's proposed rule would ultimately harm rather than help habeas petitioners.

C. This Case Is A Poor Vehicle For Deciding The Question Because Petitioner's Argument Turns On A Disputed Point Of State Law That The Seventh Circuit Decided Against Him.

Finally, even if there were a split among the circuits on the question whether a state court's decision to retroactively extend the time for filing an appeal also retroactively tolls the federal limitations period (and there is not), this case presents a poor vehicle for addressing that question. The petition proceeds from

the premise that the Illinois Supreme Court's decision allowing petitioner to file his PLA *instanter* meant, under state law, that his PLA was timely, not simply that the court decided to excuse his untimeliness and accept the late PLA. But the Seventh Circuit rejected that contention, on which the petition's first question entirely depends.

After examining Illinois law, the Seventh Circuit held that the Illinois Supreme Court's decision to accept petitioner's PLA *instanter* did *not* mean that the PLA was timely under state law. Pet. App. 16a-17a (citing *Wauconda*, 828 N.E.2d at 220-223). As the Seventh Circuit noted, in granting petitioner's motion to file his PLA *instanter*, the Illinois Supreme Court did not say that it was granting a retroactive extension of time or otherwise treating the PLA as though it were timely filed. Pet. App. 16a. Nor, as the Seventh Circuit observed, does the traditional definition of *instanter* ("right now" or "immediately") support petitioner's contention: "[a] decision to accept a document *instanter* * * * does not make it timely; it just means that the document will be considered on the merits," which is "exactly the effect of an order accepting an untimely document." *Ibid*. The Illinois Supreme Court's decision in *Wauconda*, on which petitioner attempts to rely, in fact supports the Seventh Circuit's holding that no distinction exists under Illinois law between a court "accept[ing] * * * [a] filing despite its belated submission," "grant[ing] a retroactive extension of time," and "accept[ing] [a] * * * filing *instanter*." Pet. App. 17a; compare *Wauconda*, 828 N.E.2d at 220 (effect of order allowing party to file PLA *instanter* "was to extend the [party's] deadline for filing its [PLA]"), with *id*. at 223 (order "allow[ed] the [party] to file its [PLA]

after the 21-day filing period had elapsed").[6] Petitioner seeks to relitigate this question of state law, Pet. 16-18 & n.9, but this is not grounds for certiorari review.

Accordingly, even if this Court granted certiorari and adopted petitioner's proposed rule—that a state court's decision to retroactively extend a petitioner's time for appealing also retroactively tolls the days that had run untolled before the request to appeal *instanter* was filed—this Court's ruling would have no effect on the Seventh Circuit's judgment below, which correctly found that the Illinois Supreme Court did not retroactively extend petitioner's time to appeal in the first place. Certiorari, therefore, is unwarranted.

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[6] Petitioner attempts to resuscitate the argument (made for the first time below in his reply brief) that a computer-generated docket sheet from the Illinois Supreme Court supports his contention that his PLA was not due until September 13, 2005, the date that the court granted his motion for leave to file it *instanter*. See Pet. 5. But "it is well-settled that arguments first made in the reply brief are waived." *TAS Dist. Co., Inc. v. Cummins Engine Co., Inc.*, 491 F.3d 625, 630 (7th Cir. 2007). In any event, petitioner provided no basis for authenticating the document, let alone for supposing that the court's internal docketing system provides authoritative statements of Illinois law. And, contrary to petitioner's contention, the court's official order granting leave to file *instanter* said nothing about extending the deadline to September 13. Pet. App. 152a.

II. This Case Is A Poor Vehicle For Deciding The Actual Innocence Question Because Petitioner Cannot Demonstrate Actual Innocence.

This case presents a poor vehicle for deciding whether AEDPA's one-year limitations period applies to a petitioner who can demonstrate that he is actually innocent. Even if this Court held, contrary to the majority of the circuits that have decided the issue, that a petitioner who demonstrates actual innocence may file a federal habeas petition outside AEDPA's limitations period, it would have no effect on petitioner's case.

Pursuant to Illinois law, petitioner presented a stand-alone claim of actual innocence in his postconviction petition. The postconviction trial court held an evidentiary hearing and heard testimony from the inmate eyewitnesses who testified for the State at trial. Each testified that his trial testimony implicating petitioner and Mackey was false. Pet. App. 62a. The state court concluded, however, that this live recantation testimony lacked credibility and that "the proof [was] simply not there to show that there was perjury the first time around on these three witnesses." Pet. App. 69a-70a. The state appellate court upheld these findings on appeal. Pet. App. 82a ("the trial court correctly concluded that the inmates' recant[ation] testimonies were less credible than their trial testimonies").

Specifically, the postconviction trial court found that inmate Nelson's live testimony at the evidentiary hearing—asserting that petitioner chased Moore with a shank after "any danger had arguably passed"—"hurt * * * [petitioner] more than it help[ed] him." Pet. App. 69a. With respect to Marzette, the court found that he

provided no details that supported petitioner's self-defense claim. *Ibid.* And the court discredited Cleveland's recantation testimony because he was "all over the place on his view of the facts" and is "capable of saying whatever moves him and [is] not particularly concerned with the truth." Pet. App. 70a.

Moreover, the court correctly found that the inmate witnesses' recantation testimony was inconsistent with the forensic evidence at trial, which established that Moore had been hit in the head with a pipe before being stabbed in the chest. *Ibid.* Unlike at the postconviction evidentiary hearing, at trial the inmate witnesses testified to a two-person attack on Moore, consistent with the physical evidence the jury heard. *Ibid.* The jury heard, for instance, that Moore suffered a blunt trauma injury to his head caused by considerable force and badly bruising his face. Pet. App. 49a-50a. The pathologist opined that the injury to Moore's head was consistent with a blow from the metal rod found in a trash bag on the yard. Pet. App. 50a. And the crime-scene technician opined that blood droplets on the wall surrounding the bathroom would be explained by someone running past the wall with a bleeding head wound. Pet. App. 48a.

Petitioner's actual innocence claim in federal court is based on the same evidence considered and rejected in state court. But the state court's credibility and other factual findings are "presumed to be correct," and petitioner offers no "clear and convincing evidence" to rebut that presumption. 28 U.S.C. § 2254(e)(1); see also *Marshall v. Lonberger*, 459 U.S. 422, 434 (1983) ("federal habeas courts [have] no license to redetermine credibility of witnesses whose demeanor has been

observed by the state trial court but not by them"). Petitioner contends that AEDPA's limitations period should be excused where a petitioner can show that, in light of new evidence, "it is more likely than not" that no reasonable jury would have convicted him. Pet. App. 30a (borrowing standard used to excuse procedural default under *Schlup v. Delo*, 513 U.S. 298 (1995)). But, at least in petitioner's case, where the state court considered and rejected his actual innocence claim on the merits, such a standard would conflict with § 2254(e)(1)'s presumption that a state court's factual findings are correct unless rebutted by clear and convincing evidence. Accordingly, unlike in *Souter v. Jones*, 395 F.3d 577, 590-592 (6th Cir. 2005)—where new physical evidence disproved the State's entirely circumstantial case and state experts abandoned the State's forensic theory from trial—the existence of an actual innocence exception to AEDPA's limitations period cannot benefit petitioner, and this case therefore does not properly raise the question presented.

And even if this case did present the issue, the availability of such an exception—and especially an exception employing *Schlup*'s "more likely than not standard"—would be inconsistent with AEDPA's text. Although Congress provided a detailed statute of limitations, with alternate triggering dates, 28 U.S.C. § 2244(d)(1)(A)-(D), and a tolling mechanism, 28 U.S.C. § 2244(d)(2), Congress said nothing about providing an exception for petitioners claiming to be actually innocent. In contrast, Congress expressly included an actual innocence exception to the bar against second or successive petitions. 28 U.S.C. § 2244(b)(2); see also *Escamilla*, 426 F.3d at 871-872; *David v. Hall*, 318 F.3d 343, 347 (1st Cir. 2003); *Flanders v. Graves*, 299 F.3d

974, 977 (8th Cir. 2002). And there, where Congress chose to provide the exception, it required a petitioner to make the showing not under a "more likely than not" standard, but "by clear and convincing evidence." 28 U.S.C. § 2244(b)(2)(B)(ii).

In short, even if, contrary to AEDPA's plain language, this Court adopted petitioner's preferred legal rule and held that a showing of actual innocence creates an exception to the statutory limitations period, petitioner would be unable to claim the benefit of that exception. He cannot overcome the strong presumption of correctness owed to the state court's findings that his witnesses are not credible and that the evidence of his actual innocence is otherwise lacking. Accordingly, even a ruling in petitioner's favor would have no impact on the decision below holding his habeas petition untimely, and certiorari review is therefore unwarranted.

III. This Case May Become Moot Before This Court Is Able To Decide Either Question Presented.

Finally, this case provides a poor vehicle to address either question presented because it may become moot before this Court could render a decision on the merits. Petitioner has a successive postconviction petition pending in the Circuit Court of Livingston County. That petition seeks re-sentencing on the murder conviction challenged in these habeas proceedings on the ground that petitioner's life sentence (commuted from a death sentence) was affected by a prior Cook County murder conviction for which he subsequently received federal habeas relief.

The State has initiated re-trial proceedings in Cook County.[7] If petitioner is acquitted or convicted of any crime short of first-degree murder in Cook County, he may be entitled to re-sentencing on the Livingston County conviction. At the time he was sentenced in Livingston County, the prior conviction for first-degree murder made a sentence of life imprisonment mandatory if a death sentence was not imposed. See Ill. Rev. Stat. ch. 38, § 1005-8-1(a)(1)(c) (1991). Had petitioner not been convicted of first-degree murder in the Cook County prosecution, a life sentence would not have been mandatory in the Livingston County case. See *id.* § 1005-8-1(a)(1)(b).

And if the result of the Cook County re-trial requires re-sentencing on the Livingston County murder conviction challenged in these federal habeas proceedings, then the new judgment entered in Livingston County would re-start the federal limitations period under § 2244(d)(1)(A), thereby mooting both issues raised in the certiorari petition. See *Burton v. Stewart*, 549 U.S. 147, 156-157 (2007) (*per curiam*) ("limitations period d[oes] not begin until both * * * conviction *and* sentence 'bec[o]me final by the conclusion of direct review or the expiration of the time for seeking such review'") (quoting 28 U.S.C. § 2244(d)(1)(A)) (emphasis in original).

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[7] Petitioner filed a motion to dismiss the Cook County indictment on double jeopardy and due process grounds. After the state trial court denied the motion, petitioner took an interlocutory appeal to the Illinois Appellate Court. That court affirmed, *People v. Griffith*, 936 N.E.2d 1174 (Ill. App. Ct. 2010), and the Illinois Supreme Court denied petitioner's PLA on March 30, 2011, *People v. Griffith*, No. 111322.

Accordingly, if this Court were to grant the certiorari petition, whether a justiciable case or controversy remained through briefing, argument, and decision would likely depend upon ongoing state trial proceedings, an independent reason to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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